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Perkins v. Ins. Co.
Nov. 15, Hand. C.J.

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SUPREME COURT OF THE UNITED STATES.

No. ~~347.~~ 236 84

THE ÆTNA INSURANCE COMPANY, PL'FFS IN ERROR,

vs.

SAMUEL H. WEBSTER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED DECEMBER 22, 1865.

GOVERNMENT PRINTING OFFICE.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the seventh circuit and eastern district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is in the said circuit court before you between Samuel H. Webster and the Ætna Insurance Company, of Hartford, Connecticut, a manifest error hath happened, to the great damage of the said Ætna Insurance Company, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Mon-

2 day of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this fifteenth day of July, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the ninetieth.

WM. D. WILKINS,
Clerk U. S. Circ't C't, 7th Circ't and Eastern District of Michigan.

Allowed by—

ROSS WILKINS,
District Judge, East'n District of Michigan.

[U. S. rev. stamp, 50 cts.]

3 UNITED STATES OF AMERICA, *ss:*

To Samuel H. Webster, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the seventh circuit and eastern district of Michigan, wherein the Ætna Insurance Company, of Hartford, Connecticut, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Ross Wilkins, one of the judges of the said circuit court for the eastern district of Michigan, this fifteenth day of July, in the year of our Lord 1865.

ROSS WILKINS,
U. S. District Judge for the Eastern District of Michigan.

We hereby accept service of the within citation.

WALKER & RUSSELL, *Pl'ff's Att'ys,*
By ALFRED RUSSELL.

4 Pleas before the judges of the circuit court of the United States for the seventh circuit and eastern district of Michigan, at the district court-room, in the city of Detroit, of the term of June, in the year of our Lord one thousand eight hundred and sixty-five, in the cause wherein Samuel H. Webster is plaintiff and the Ætna Insurance Company is defendant.

DISTRICT OF MICHIGAN, *ss:*

Be it remembered that on the sixteenth day of May, in the year of our Lord one thousand eight hundred and sixty-one, the said plaintiff, by Walker & Russell, his attorneys, came into the court aforesaid, before the judges thereof, and filed his declaration against the said defendant; which said declaration is in the words and figures following, to wit:

Declaration.

The circuit court of the United States for the seventh circuit and district of Michigan, of the sixteenth day of May, A. D. 1861.

UNITED STATES OF AMERICA, *District of Michigan, ss:*

Samuel H. Webster, of Saginaw City, in the State of Michigan, and who is a citizen of the State of Michigan, by Walker &
5 Russell, his attorneys, filing this his declaration at commencement of suit, complains of the Ætna Insurance Company, of Hartford, in the State of Connecticut, and who is a citizen of the State of Connecticut, a corporation created by an act of the general assembly of said State, approved June 5th, A. D. 1819, and the acts amendatory thereto, and authorized to transact the business of insurance in the State of Michigan under an act of the legislature thereof, approved February 15th, A. D. 1859, defendants herein, on a plea of trespass on the case upon promises; for that whereas on the 25th day of September, A. D. 1860, the plaintiff was owner of the schooner Ottoca, then being in safety on the lakes, and the said defendants at East Saginaw, in the State of Michigan, in consideration of a premium therefor paid to them by the plaintiff, made a valued policy of insurance upon the said schooner, to be employed in the general freight and passage business upon the said lakes, including Lake Erie, between said date and the 30th day of November then next, and thereby promised to insure for the plaintiff seventeen hundred and thirty-three dollars upon said schooner for said business during said time against the perils of the lakes and other perils in said policy mentioned.

And said plaintiff avers that said schooner, after said 25th day of September, was employed in said general freight and passage
6 business on the lakes, as described in said policy, and whilst so engaged therein upon Lake Erie, navigating waters described in said policy, and before the said thirtieth day of November,

was by the perils of the lakes wrecked and totally lost, of which the defendants forthwith had notice, and were bound to pay the same in sixty days; yet they have never paid the said sum of seventeen hundred and thirty-three dollars, though sixty days have elapsed.

And whereas, also, the defendants, on the first day of May, A. D. 1861, were indebted to the plaintiff in three thousand dollars, for the price and value of goods then sold and delivered by the plaintiff to the defendants, at their request, and in a like sum for the price and value of work then done, and materials for the same provided by the plaintiff for the defendants, at their request, and in a like sum for money then lent by the plaintiff to the defendants, at their request, and in a like sum for money then paid by the plaintiff for the defendants, at their request, and in a like sum for money then received by the defendants for the use of the plaintiff, and in a like sum for money found to be due from the defendants to the plaintiff on an ac-
7 count stated between them.

And whereas the defendants afterwards, and on the day and year aforesaid, in consideration of the premises, respectively, then promised the plaintiff to pay him the said several last-mentioned moneys, respectively, on request, yet they have disregarded their promises, and have not paid any of the said moneys, or any part thereof, to the plaintiff's damage of three thousand dollars.

And thereupon he brings suit, &c.

WALKER & RUSSELL,
Plaintiff's Attorneys.

Plea.

And the said defendants, by Newbury, Pond & Russell, their attorneys, come and defend the wrong and injury, when, &c., and say that they did not undertake or promise in manner and form as the said plaintiff has above thereof complained against them, and of this they put themselves upon the country, &c.

NEWBURY, POND & RUSSELL,
Defendant's Attorneys.

Affidavit of merits.

NORTHERN DISTRICT OF NEW YORK, *ss:*

8 Ebenezer P. Dorr, being duly sworn, deposes and says that he is the attorney in fact of the defendants in the above-entitled cause, and makes this affidavit in their behalf; and this deponent further says that he verily believes the above plea to be true in substance and matter of fact; and this deponent further says that he has fully and fairly stated the case in this cause to Mess. Newbury, Pond & Russell, counsel for defendants in said cause, who reside at Detroit, in the district of Michigan, and that said defendants have a good and substantial defence upon the merits thereof, as this deponent is informed by said defendant's said counsel, after such statement as aforesaid, and verily believes to be true.

E. P. DORR.

Subscribed and sworn before me this 8th day of June, 1861.

N. K. HALL, *Dist. Judge.*

Award of venire.

Therefore, to try the issue above joined, let a jury come thereof, by whom, &c., who neither, &c., because as well the said plaintiff as the said defendants have put themselves on that jury.

Trial.

And the jurors of that jury of whom mention is made, to wit,
Charles W. Fullington, Henry Chipman, Hugh O'Beirne,
9 John C. Emory, Smith Titus, Henry Palmer, Thomas Chase,
Elisha B. Strong, John B. Coudon, William Harsha, J. B. Cole, and James Parshal, who were elected, tried, and sworn well and truly to try the issue joined between the parties aforesaid, and after hearing the evidence adduced and the arguments of counsel and receiving the charge of the court, retire to their room to consult of their verdict, under the charge of George Hancock, the officer sworn to attend them, and, after being some time absent, return into court and say that they have not agreed upon their verdict, and that there is no probability they will be able to agree; and hereupon they are discharged from further consideration of the case.

Award of second venire.

Therefore, to try the issue above joined, let a new jury come thereof, by whom, &c., to recognize, &c., because as well the said plaintiff as the said defendants have put themselves upon that jury.

Continuances.

And thereupon the said cause is continued between the parties aforesaid from term to term of said court, until the present term of
June, in the year of our Lord one thousand eight hundred and
10 sixty-five. And now, to wit, on the fourteenth day of June, of
the present term of June, in the year of our Lord one thousand eight hundred and sixty-five, come the parties aforesaid, by their respective attorneys, into the court aforesaid, before the judge thereof now here.

2d trial.

And the jurors of that jury of whom mention is made, to wit, Joshua A. Leland, Samuel Miller, Myron E. Knight, William Moore, Robert Rumney, Joseph Long, John S. Marks, Donald L. McDouell, Martin Havens, Peter Provencal, James O. Melick, and John Farrar, who were elected, tried, and sworn well and truly to try the issue joined in this case, and, after hearing the evidence adduced and the arguments of counsel, and receiving the charge of the court, retire to their room to consult of their verdict, under the charge of James Henry, the officer duly sworn to attend them; and, after being a short time absent, return into court and say they find the defendant did undertake and promise in manner and form as the said plaintiff hath in his de-

claration alleged against him ; and they, the said jury, assess the said plaintiff's damages by reason thereof at the sum of two thousand two hundred and seventy-five dollars and forty-five cents ($2,275 45.)

11 *Motion for a new trial.*

And now come the said defendants, by Newbury & Pond, their attorneys, and move the court to vacate and set aside the verdict heretofore rendered in this cause, and to grant a new trial thereof, for reasons as follows, to wit :

1st. The court erred in instructing the jury that it was for them to determine from the evidence whether said defendants rejected the plaintiff's application for insurance in good faith and for a substantial reason, or arbitrarily.

2d. The court erred in instructing the jury that, even if defendants rejected said application in good faith, they were bound to give the plaintiff notice of such rejection within a reasonable time.

Motion for new trial overruled.

And hereupon the court aforesaid, before the judges thereof now here, after hearing the arguments of counsel on behalf of plaintiff and defendant, deny and overrule the said motion of said defendant for a new trial as aforesaid.

Judgment.

It is therefore considered by the court now here that the said plaintiff, Samuel H. Webster, do recover of the said defendant, the Ætna Insurance Company, the sum of two thousand two hundred and seventy-five dollars and forty-five cents ($2,275 45) for his damages assessed by the jury as aforesaid, in form aforesaid, together with the sum of sixty-seven dollars and fifty-six cents, for the costs and charges of the said Samuel H. Webster, by him about his suit in this behalf laid out and expended.

12

Judgment rendered and signed July 15, 1865.

WM. D. WILKINS, *Clerk.*

13 Circuit court of the United States for the eastern district of Michigan.

SAMUEL H. WEBSTER
vs.
THE ÆTNA INSURANCE COMPANY.

At a session of said court held at Detroit, in said district, on the thirteenth day of June, A. D. 1865, before the honorable Noah H. Swayne, circuit judge, the issue joined between the parties in this cause came on to be tried by a jury of said district, in that behalf duly chosen, empanelled, and sworn.

And upon the trial of said issue the counsel for said plaintiff, to maintain and prove the said issue on his part, gave in evidence that

on and prior to the 25th day of September, A. D. 1860, the said plaintiff was the sole owner of a schooner called the Ottoca; that on and prior to said last-mentioned day the defendants were a corporation organized under the laws of the State of Connecticut, and authorized to transact the business of insurance in the State of Michigan, and that E. G. Ripley was the president and Thomas K. Brace, jr., the secretary of the said corporation; that one William L. Webber was, on the said 25th day of September, and had
14 been for several years prior thereto, an agent of said corporation, defendant, at East Saginaw, in the State of Michigan, appointed under letters of authority, in words and figures following, to wit:

Commission of Ætna Ins. Co.

Be it known that by the power legally invested in the subscriber as general agent, that William L. Webber, of East Siginaw, in the county of Saginaw, State of Michigan, is appointed and by these presents duly constituted agent of the Ætna Insurance Company, Hartford, Conn., with full power to receive proposals for insurance against loss or damage by fire and the perils of inland navigation; to act as surveyor or to appoint surveyors for property to be insured in the town of East Saginaw and vicinity, and insurance thereon to make, by policies of said Ætna Insurance Co., countersigned by said William L. Webber, agent, or to renew the same, grant assent to assignments or transfers, and in all manner attend to the business and duties of the said agency under the instructions of the company.

In testimony whereof, the said Ætna Insurance Company have caused this to be sealed and signed by J. B. Bennett, general agent in the city of Cincinnati, Ohio, at their branch office, on the 27th day of January, A. D. 1855.

(Signed) J. B. BENNETT. [SEAL.]

15 Which letter of authority was, on the said 25th day of September, 1860, and for a long time prior thereto had been, publicly posted and exposed in the office of said Webber.

15 That on said 25th day of September, 1860, the said plaintiff applied to said Webber, as agent of said corporation, defendant, for insurance upon the hull of the said schooner Ottoca, for the residue of the then season of navigation. That the said Webber thereupon caused to be filled up a policy of insurance upon the hull of said schooner Ottoca, and countersigned and delivered the same to the plaintiff, which policy of insurance was duly signed by said E. G. Ripley, then president, and by said Thomas K. Brace their secretary, of said corporation, defendant, and was partly written and partly printed, and a copy whereof is hereto annexed, marked Exhibit A, and made a part hereof.

And the said plaintiff thereupon made and delivered to said Webber a premium note for the amount of the premium mentioned in said policy.

And the said plaintiff also gave in evidence that previous to the

said 25th of September, 1860, the said Webber had in his possession the blank policy of insurance so filled up and delivered to said
16 plaintiff, together with several other blank policies exactly similar to the said policy so delivered, all which blank policies were duly signed by the said president and secretary of said defendant corporation; that said Webber had previously insured said schooner Ottoca, as agent for said defendant corporation, in the year 1858, upon the application of said plaintiff, and had issued to said plaintiff a policy of insurance thereon, duly signed by the officers of said defendant corporation.

That the said schooner Ottoca was, on or about the 25th day of October, A. D. 1860, wrecked and became a total loss, from perils covered by said policy of insurance, and that notice in writing was given to said defendants within sixty days after such loss.

The counsel for the plaintiff here rested his case.

And the counsel for said defendant, to maintain and prove the said issue on his part, gave in evidence that on the said 25th day of September, 1860, immediately after the said policy was handed by said Webber to said plaintiff, said plaintiff, at the request of
17 said Webber, signed an application, which paper was partly in print and partly in writing, and a copy whereof is hereto annexed, marked Exhibit B, and made part hereof.

And the said defendant further gave in evidence that prior to said 25th day of September, 1860, to wit, in the year 1859, the said Webber had been duly instructed to make no insurance on behalf of said defendant corporation on the hulls of vessels until an application therefor in the form of the application signed by said plaintiff had been first taken, duly signed by the party desiring such insurance, and by said Webber, as agent, and forwarded to one E. P. Dorr, a general agent of said defendant in that behalf, for his, said Dorr's, indorsement of approval or rejection.

The blank forms for such applications had been by said defendants furnished to said Webber, one of which forms was used for the application so signed by said plaintiff. That said application was immediately forwarded by said Webber to said E. P. Dorr, for his approval or rejection, and that the same was received by said Dorr on the 29th day of said September, and at once indorsed with his non-ap-
18 proval across the face thereof, as follows, to wit, "Not approved, E. P. Dorr, gen'l agent," and returned by mail to said Webber, enclosed with a letter, in words and figures following, to wit:

AGENCY OF ÆTNA INSURANCE CO. OF HARTFORD,
Buffalo, Sept. 29, 1860.

W. L. Webber, esq., Saginaw Michigan:

MY DEAR SIR: I return you herewith, without my approval, the applications for insurance on the schooners W. H. Willard, and Ottoca. We do not take hull risks in the Ætna Co. for the butt end of the fall. It can only result in loss to any company. If you can get these

vessels for a yearly risk, at full regular rates, less 12 per cent. rebate, as for a stock co., and get good paper at 2 and 6 months, I will issue the policies and send you, on application in due form. Hull policies to be issued at your ag'cy, are to be issued from this office. Notes for signature will accompany them, to be returned here when signed. You will please, on receipt, return to the parties giving them the premium notes on the Willard and Ottoca, and cancel the policies.

I am, resp'ly yours,

E. P. DORR, *Gen'l Ag't.*

19 That said letter was received by said Webber on or about the 2d day of October, 1860.

That prior to the issuing of said policy, issued in the year A. D. 1858, on the said Ottoca, an oral application for such insurance had been made to said Webber by said plaintiff, and submitted by said Webber by letter to J. B. Bennett, then general agent in that behalf of said defendants, and approved by said Bennett, and said Webber authorized to issue said policy.

The counsel for the defendant here rested his case.

And the counsel for the plaintiff, further to maintain and prove the issue on his part, gave in evidence that upon the receipt of said letter enclosing said application not approved by said Dorr, said Webber wrote in regard to the matter to J. B. Bennett, general agent for said defendant for all the western States, residing at Cincinnati, and on or about the 10th day of said October, received from said Bennett a letter in reply, in words and figures following, to wit:

20 CINCINNATI, *October 6th*, 1860.

W. L. Webber, esq., agent, East Saginaw, Mich.:

DEAR SIR: Your favor of the 2d, with surveys of the schooners W. H. Willard and Ottawa, also letter from Capt. Dorr, is received, and we are surprised at the tone of your letter. We never take hull risks for the last of the season; our instructions are to decline the same, and we wish you to cancel these policies. Yearly risks on hull we sometimes take, but when parties wish only to insure when the hazard they know is very great, we decline the same, knowing full well that such risks result in loss to the Co. By pursuing this course we certainly cannot earn the reputation of backing out of contracts regularly made, as you seemed to fear, for this contract made by you was, as the application distinctly says, "the insurance is to take effect when approved by E. P. Dorr, gen'l agent, Buffalo," and he does not approve of the same; then again the policies are to be issued by Capt. Dorr, neither of which was done. Capt. Dorr's letter and applications returned.

Yours, truly,

J. B. BENNETT, *Gen'l Ag't.*

21 We won't touch a lake hull at this branch late in the season.

That said defendant corporation did not, nor did any one on their behalf, give notice to said plaintiff of the rejection of said application, until the 27th day of October, 1860, when the said plaintiff, having called on said Webber to give him notice of the loss, was informed by said Webber that said application had been rejected.

It was also given in evidence on the part of said plaintiff, that on the day the premium note above mentioned became due, said plaintiff tendered to said Webber, as agent of said defendant, the amount thereof in gold, which was refused, and on the part of said defendant, that on the 27th of October, 1860, said Webber offered to return said premium note to said plaintiff.

No other evidence was given.

And thereupon the said circuit judge instructed the jury as follows:

I. The defendant had a right to limit the authority of its agent, and so far as the limitations imposed were known to the plaintiff, he was bound by them.

22 II. The application of the plaintiff and the policy of the defendant were one transaction, and the plaintiff cannot deny knowledge of what is spread upon the paper signed by him.

III. That paper authorized the defendant in good faith, but not arbitrarily, to reject the application and annul the policy issued to the plaintiff.

IV. Whether the application was rejected in good faith is a question for the jury to determine. If the defendant did not act in good faith in this respect the plaintiff is entitled to recover.

V. If the defendant did reject the application in good faith, it was bound thereupon, under the circumstances of the case, to give notice of that rejection within a reasonable time to the plaintiff.

VI. If that notice was not given to the plaintiff, and no knowledge of it came to him until after the loss of the vessel on the 25th of October, he was not notified within a reasonable time, and the plaintiff is, in that event, entitled to recover.

23 And to the giving of each of the said several instructions, marked III, IV, V, and VI, the said defendants, by their counsel, did then and there except.

The said issue was thereupon submitted to the jury, and they then and there found a verdict for the said plaintiff, and assessed his damages on occasion of the premises, at the sum of $.

And because none of the exceptions so offered and made do appear upon the record of the said trial, therefore, on the prayer of the said defendants, by their said counsel, the said circuit judge has signed and sealed this bill of exceptions, this 1st day of July, A. D. 1865.

N. H. SWAYNE.

24 *Exhibit A.*—No. 4.—*Copy.*

The Ætna Insurance Company, of Hartford, Conn., on account of Samuel H. Webster, of Saginaw City, Mich., do make assurance, and cause seventeen hundred and thirty-three dollars to be insured upon the body, tackle, apparel and other fur-

Sum insured, $1,733.

nature of the schooner called the Ottaca, wherever she is, in safety, at noon of the 25th day of September, 1860, and from thence to noon of the 30th day of November, 1860, when this policy shall cease and expire, unless sooner terminated or made void by conditions hereinafter expressed.

With permission to be employed in the general freighting and passage business, and to navigate the waters, bays, harbors, rivers, and canals of Lake Superior during any portion of the life of this policy, between noon of April 1st and noon of November 20th; and of Lakes Michigan, Huron, St. Clair, Erie, Ontario, and the river St. Lawrence, via the canals customarily used by vessels of her class to Montreal, C. E., between noon of April 1st and noon of November 30th; and the residue of the time, if any, between noon of November 20th, and noon of April 1st, on Lake Superior, and between noon of November 30th, and noon of April 1st, on the other lakes, &c., said vessel shall be laid up and safely moored, satisfactory to this company.

Vessel valued at $2,600. The said vessel, tackle, apparel, &c., hereby insure dare valued at twenty-six hundred dollars, without any further account to be given by the assured to the assurers for the same.

Touching the adventures and perils which the said Ætna Insurance company is content to bear and take upon itself by this policy, they are of the lakes, rivers, canals, fires, jettisons, that shall come to the damage of the said vessel, or any part thereof, excepting all perils, losses, or misfortunes arising from or caused by the following, or other legally excluded causes: For damage that may be done by the vessel hereby insured to any other vessel or property; from incompetency of the master or insufficiency of the crew, or from the want of ordinary care and skill in loading and stowing the cargo of said vessel; from rottenness, inherent defects, and other unseaworthiness; from theft, barratry, or robbery; from the bursting or explosion of boilers, collapsing of flues, or breakage of machinery, unless occasioned by unavoidable external cause, or fire ensue therefrom; from charges, damage, or loss in consequence of a seizure or detention; for or on account of any illicit or prohibited trade, or any trade in articles contraband of war; from any claim for wages or provisions furnished to officers or crew, while the property insured may be detained by any disaster, or during subsequent repairs, excepting always services rendered in recovering and securing the vessel or property covered by this policy; from anchors being cast without being properly and sufficiently buoyed; from gangways and openings through the deck being improperly and insecurely secured and protected.

The assurers hereby acknowledge the receipt of a note due Nov. 1st, 1860, from S. H. Webster, for the consideration of this insurance; Rate 8½ per cent. Premium $77 78. which, at the rate of 8½ per cent. on $1,733 is $147 30, less $58 92 and $10 60 is $77 78; policy $1. Total amount of note $78 78.

In case of loss or misfortune, it shall be lawful and necessary to and for the assured, his agents, factors, servants, and assigns, to give the assurers prompt notice of the disaster, and plan adopted for re-

covering and saving the property; to sue, labor, and travel for, and to make all reasonable exertions in and about the defence, safe guard, and recovery of the said vessel, or any part thereof, without prejudice to this insurance; and after recovery and the holding of a survey by persons chosen by the insurers and insured, or their agents, made under oath, setting forth the particulars of actual damage received by the vessel in the disaster, and discriminating between those and former defects, and wear and tear, the insured are to cause the same to be forthwith repaired, and in case of neglect or refusal on the part of the insured, his agent or assigns, to adopt prompt and efficient measures for the safe-guard and recovery thereof, or to repair the same when recovered, then the said insurers are hereby authorized to interpose and recover the said vessel, and to cause the same to be repaired for account of the insured; to the expenditures whereof the said Insurance Company will contribute according to the proportion the sum insured bears to the valuation aforesaid, and the surplus, if any, advanced by said insurers (including the premium note, if unpaid) shall be a lien upon and shall be recoverable against the said vessel or any part thereof, or against the insured, at the option of the insurers; but no partial loss, or particular average, shall in any case be paid by the insurer, unless amounting to 7 per cent. of the valuation aforesaid. Each passage from port to port shall be subject to its own separate average.

Particular average 7 per cent.

Losses shall be payable in sixty days after proofs of such loss or damage, and of the amount thereof, and proof of the interest of the assured shall be made and presented at the office of said company, (the amount of the premium on this policy, if unpaid, and all other indebtedness due this company being first deducted;) and in all cases of loss or damage, one-third, new for old, shall be deducted from the amount of actual cost of repair or estimate for same, (except on anchors,) and no partial loss shall be claimed or paid, unless amounting to a particular average, after such deduction.

It is also agreed that the acts of the insured or insurers, or their agents, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under this policy; but such acts shall be considered as done for the benefit of all concerned, and without prejudice to the rights of either party. Further, the insured shall not have a right to abandon the vessel in any case, unless the amount which the insurers would be liable to pay under an adjustment, as of a partial loss, exclusive of general average and charges of the nature of general average, shall exceed half the amount insured; nor shall detention by the season, or by any other cause, be alleged or allowed as cause for abandonment. Moreover, no abandonment, in any case whatever, even when the right to abandon may exist, shall be held or allowed as effectual or valid, unless it shall be in writing, signed by the insured, and delivered to the said company or to their authorized agent, nor unless it shall be efficient, if accepted, to convey to and to vest in the said Insurance Company an unincumbered and perfect title to the subject aban-

doned; and the valuation of said vessel, expressed in this policy, shall be considered the proper value in adjusting losses covered by this policy.

It is also agreed that this policy shall become void, if any other insurance is or shall be made upon the vessel hereby insured, which, together with this insurance, shall exceed the sum of seventeen hundred and thirty-three dollars.

Limit of insurance $1,733.

It is also agreed that all claims under this policy shall be void, unless prosecuted within one year from the date of the loss. And in case the note or obligation given for the premium herefor be not paid at maturity, the full amount of premium shall be considered as earned, and this policy becomes void, while said note or obligation remains over-due and unpaid.

It is also agreed that in all cases when carrying grain cargoes in bulk the vessel hereby insured shall have same secured by good and sufficient shifting boards, properly and securely put in place, so as to effectually prevent shifting of the cargo.

Warranted not to load with railroad iron, pig metal, stone, ores, or marble wholly, beyond her tonnage, according to the American custom-house tonnage measurement; but if half or less than half of her tonnage be laden with above articles, her lading shall not exceed her tonnage more than twenty per cent.

Warranted not to engage in the lumber trade off the shores of lakes Michigan or Huron without special permission of this company.

The interest of the assured in this policy, or any part thereof, or in the property hereby insured, or any part thereof, is not assignable, unless by consent of this corporation, manifested in writing; and in case of transfer or termination of any such interest of the assured, either by sale or otherwise, without such consent, this policy shall from henceforth be void and of no effect; and no assignment or transfer shall in any case relieve the insured, or property hereby insured, from any or all of the conditions herein expressed, and a violation of or non-compliance with any of such conditions, either by the assignee or by the assignor, before or after the assignment, shall vitiate this policy.

This policy shall not be binding until countersigned by W. L. Webber, esq., agent of the company, at East Saginaw, Michigan.

In witness whereof, the president of the said Ætna Insurance Company hath hereunto subscribed his name and caused the same to be attested by their secretary in the city of Hartford, Conn.

E. G. RIPLEY, *President.*

THOS. K. BRACE, Jr., *Secretary.*

Countersigned at East Saginaw this 25th day of September, 1860.

WILLIAM L. WEBBER, *Agent.*

The Ætna Insurance Company hereby consent that the interest of the within policy, subject to all the terms and conditions therein mentioned and referred to, be assigned to 185 . For value received, hereby transfer, assign, and set over unto all title and interest in the within policy. Witness hand and seal this day of 185 . Sealed and delivered in presence of

25 Indorsed: No. 4. Ætna Insurance Company, of Hartford, Conn., to S. H. Webster. Vessel, schooner Ottaca. Valuation, $2,600.

Insured	$1,733
At 8½ per cent	$147 30
Less	$
Is	7 00
Policy	$
Total	78 78

Commenced Sept'r 25th, 1860; expires Nov. 30th, 1860.

26 *Exhibit B.—Hull application.*

NOTE.—An application in due form, signed by the applicant, is the first requisite in effecting marine insurance on hull or cargo. This form must be used by agents on all applications for hull insurance in Ætna Insurance Company, and forwarded for my indorsement of approval or rejection.

E. P. DORR, *Gen'l Agent.*

Insurance is wanted in the Ætna Insurance Co., of Hartford, for account of S. H. Webster. Loss, if any, payable to him on the schooner Ottoca. Registered custom-house tonnage, 173, class, B 2.

Each passage from port to port subject to its own average, warranted by the assured free from particular average under 7 per cent. for balance of season, to wit, from noon of the 25th day of September, 1860, until noon of the 30th day of November, 1860. Trade to be employed in: general carrying trade of lumber, stone, and coal between Saginaw and Cleveland and intermediate ports; for $1,733 at 8½ per cent. is $147 30, less drawbacks, $58 92 and $10 60 is $77 78. Policy $1. Total amount of premium $78 78. Vessel valued at $2,600. Insurance limited to $1,733. Proposed premium note at 4 mos. given by S. H. Webster, of Saginaw City, indorsed by Curtiss, Bliss & Co., of . Payable at W. L. P. Little & Co.'s, Nov. 1, 1860.

S. H. WEBSTER, *Applicant.*
WM. L. WEBBER, *Agent.*

The insurance on this application is to take effect when approved by E. P. Dorr, general agent of the Ætna Insurance Company, at Buffalo, N. Y.

27 Filed in open court July 3, 1865.
JNO. WINDER, *Dep'ty Clerk.*

SUPREME COURT OF THE UNITED STATES.

THE ÆTNA INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL H. WEBSTER.

ARGUMENT ON THE PART OF THE PLAINTIFF IN ERROR.

GEORGE B. HIBBARD, *for the Plaintiff in Error, Buffalo, N. Y.*

SUPREME COURT OF THE UNITED STATES.

THE ÆTNA INSURANCE COMPANY,
Plaintiff in Error,
vs.
SAMUEL H. WEBSTER.

GEORGE B. HIBBARD, *for the Plaintiff in Error, Buffalo, N. Y.*

This was a suit brought on a Marine Policy of Insurance. On and prior to the 25th of September, 1860, Samuel H. Webster, the defendant in error, was owner of the schooner Ottoca. One William L. Webber on that day was, and for some years prior thereto, had been an agent (but with limited power) of The Ætna Insurance Company, the plaintiff in error, at Saginaw, in the State of Michigan. The Ætna Insurance Company was a corporation under the laws of the State of Connecticut. Webber's authority was derived from a letter or appointment dated January 27, 1855, signed by a General Agent of the Company, by which Webber was authorized "to receive proposals for insurance against loss or damage by fire, and the "perils of inland navigation; to act as surveyor, or to appoint surveyors for "*property to be insured in the town of East Saginaw and vicinity, and* "*insurance thereon to make* by policies of the said Ætna Insurance Com- "pany, countersigned by the said William L. Webber, agent, or to renew "the same, grant assent to assignments or transfers, and in all manner "attend to the business and duties *of said agency*, under the instructions "of the Company." (Record, fol. 14.) This letter of authority was on the 25th of September, 1860, and for a long time prior thereto had been publicly posted and exposed in Webber's office. (Fol. 15.)

On the 25th of September, 1860, Webster applied to Webber for insurance upon the Ottoca, (fol. 15,) and Webber thereupon caused to be filled up, and countersigned, and delivered to Webster a marine policy of insurance, which was also signed by the President and Secretary of the Insurance Company, and Webster gave Webber a note for the amount of the premium mentioned in the policy. Webster also proved on the trial that previous to the 25th of September, 1860, Webber had in his possession the blank policy of insurance which was so filled up and delivered, together with several other blank policies similar to the policy so filled up, all of which blank policies were signed by the President and Secretary of the Company, and that Webber had previously, and in the year 1858, insured the Ottoca, as agent for the defendant upon the *application* of the plaintiff, and had issued to him a policy of insurance thereon signed by the officers of the Company. (Fol. 16.) Webster proved the total loss of the vessel on or about October 25, 1860, and notice of such loss to the Insurance Company.

The Insurance Company, on its part, proved that on the 25th of September, 1860, immediately after the policy was handed by Webber to Webster, Webster signed an application in which it was specified that "insurance is *wanted*" in the Ætna Insurance Company on the Otoca for the account of Webster, and in which it is especially provided that "the insurance on this application is *to take effect* when approved by E. P. Dorr, "General Agent of the Ætna Insurance Company at Buffalo, N. Y." (Fol. 26.) The particulars of the insurance stated in this paper, correspond with the particulars in the policy.

The Insurance Company also proved that prior to September 25, 1860, and in 1859, Webber had been instructed to make no insurance on behalf of the Company on the hulls of vessels, until an application therefor in form of the application signed by Webster had been first taken, signed by the party desiring the insurance, and by Webber as agent, and forwarded to E. P. Dorr, as General Agent of the Company, for his approval or rejection. Blank forms for application had been furnished by the Company to Webber, one of which was used for the application in this case. (Fol. 17.) The application was immediately forwarded by Webber to Dorr, for his approval or rejection. It was received by Dorr on the 29th of September, 1860, and at once endorsed with his non-approval—"Not approved, E. P. Dorr, General Agent;" and returned by mail to Webber. (Fol. 18.) Dorr, at the same time, wrote Webber, stating in substance that the Insurance Company did not take hull risks for the latter end of the fall, (when of course the risk of loss is great,) and instructing Webber to return to Webster the premium note given by him and cancel the policy. The letter also stated to Webber—what he of course before knew and knew from his special instructions and authority, for by that authority, it is claimed, he was only to receive proposals for marine insurance, his power to "make insurance" being to make such insurance only on property "in the town of East Saginaw and vicinity," (fol. 14,)—that hull policies to be issued at his office, were to be issued from the Buffalo office, &c. (Fol. 18.) Prior to the issuing of the policy issued in 1858, an oral application had been made to Webber by Webster, and submitted by letter to J. B. Bennett, then General Agent of the Insurance Company, and approved by Bennett, and Webber authorized to issue the policy then issued. (Fol. 19.)

Webster proved that upon the receipt of Dorr's letter, and his non-approval of the application, Webber wrote to Bennett, the General Agent at Cincinnati; and on or about October 10th, 1860, received from Bennett a letter dated October 6, 1860, disapproving Webber's acts, rejecting the risk, and calling his attention specially to the fact that the insurance was only to take effect when approved by Dorr, &c. (Fol. 20.)

Webster also proved that the Company did not give notice to Webster of the rejection of the application till October 27, 1860, when Webster called on Webber to give him notice of the loss, and when Webster was informed that the application had been rejected. On the day when the premium note became due, Webster tendered Webber the amount of the premium note in gold, which was refused. On the 27th of October, 1860, (when Webber gave Webster notice that the application had been rejected,) Webber tendered Webster the premium note. (Fol. 21.)

His honor, Mr. Justice Swayne, charged the Jury:

"I. The defendant had a right to limit the authority of its agent, and "so far as the limitations imposed were known to the plaintiff, he was "bound by them.

"II. The application of the plaintiff and the policy of the defendant "were one transaction, and the plaintiff cannot deny knowledge of what is "spread upon the paper signed by him.

"III. That paper authorized the defendant in good faith, but not arbi- "trarily, to reject the application and annul the policy issued to the plain- "tiff.

"IV. Whether the application was rejected in good faith, is a question "for the jury to determine. If the defendant did not act in good faith in "this respect, the plaintiff is entitled to recover.

"V. If the defendant did reject the application in good faith, it was "bound thereupon, under the circumstances of the case, to give notice of "that rejection within a reasonable time to the plaintiff.

"VI. If that notice was not given to the plaintiff, and no knowledge "of it came to him until after the loss of the vessel on the 25th of October, "he was not notified within a reasonable time, and the plaintiff is, in that "event, entitled to recover."

To each of the instructions marked respectively III, IV, V, VI, the counsel for the Company excepted.

POINT FIRST.

The exception taken to the third instruction should be sustained, and the judgment reversed.

By the provision in the application for insurance, (which the Court correctly regarded as a part of the transaction of which the policy was also a part,) it is expressly provided, in substance, that the insurance was only "*wanted*" by Webster; and, as by the application, a part of the same transaction, it is also expressly provided "the insurance on this application is *to take effect when approved*," &c., it, of course, did not take effect until that approval took place. It was a mere proposition for a contract, only to become complete on the happening of the approval of the risk by Dorr. This plainly appears from the papers. When Webster, in his application, stated that he "wanted" insurance, it clearly gave the transaction the character of a proposition only on Webster's part, and when it was specifically provided that the "insurance on this *application* is *to take effect* when approved," &c., it as clearly appears that no contract was complete, that the minds of the contracting parties did not meet, until the approval actually took place. The statement of this part of the case must carry the conviction with it, that no contract was complete.

The case of Perkins *vs.* The Washington Ins. Co., 4 Cowan, 645, is a different case. In that case the agent, although his powers were otherwise limited, was authorized to make the *risk binding* from the time of the application and payment of the premium to him, but it was provided that the home office of the Company should recognize the rate of premium which he should charge, and should be otherwise satisfied with the risk. The loss occurred between the time of the payment of the premium to the agent and its receipt by the Company, and of course before the Company decided whether or not it was sat-

isfied with the risk. Chancellor Kent (see his opinion, 4 Cowan, 647,) even in that case decided that the Company was not liable. The Court of Errors, however, reversed his decree. This was a suit in equity. The Court, proceeding in some degree at least, upon its maxim, that what ought to have been done should be regarded as done, and when there was no pretense of a reason why the Company should not have been satisfied with the risk, might well hold that where the risk was made *binding in the first place*, and the loss happened before the Company had expressed its dissatisfaction with the risk, and there was no reason why it should not have been satisfied, it would be inequitable to permit the Company to exercise an arbitrary right, which, it was apparent it would not have exercised had the risk been brought to its attention before the loss occurred.

That case is not this. This is an action at law. A contract must be proven, and proven complete, before an action can be sustained upon it, and no equitable principle can aid in its completion.

Milner *vs.* Field, 5 Exchcq., 829.
McCotter *vs.* The Mayor, &c., 35 Barb., 609.

In this case, beside, the proof showed good and substantial reasons upon the part of the Company for declining to make the insurance. It would not take a risk for the latter part of the Fall, when vessels are exposed to so much danger upon the Western lakes. The Company exercised no arbitrary right of refusal. It ought not to have taken the risk, and no equitable rule that what ought to have been done should be considered as done, can apply. Nor in this case was there any proof that the loss occurred before the risk was rejected, the bill of exceptions showing it to have occurred on or about the 25th day of October, 1860, (fol. 16,) and doubtless after Dorr had disapproved the risk. On the contrary, it appears that the Company rejected the risk at once.

Again, in *Perkins vs. The Washington Insurance Company*, the question as to the powers which third persons have a right to imply an agent has, was incidentally at least, connected with the case. No such question can arise here. The agent's powers were to "*receive proposals*" for insurance against loss, &c., but only to make insurance upon property in and in the vicinity of East Saginaw. (Fol. 14.) This, it is contended, is the fair construction of the power. Nor did having a blank policy in his possession extend his power.

Phillips on Insurance, § 1818.

There were no precedent acts, of a kindred nature, which could authorize third parties to think that the agent had any power to make any insurance. The single transaction of the present defendant in error with Webber in 1858, was precisely of the nature of this one, and the defendant in error then made an application which had been submitted to a General Agent of the Company. (Fol. 19.) The letter of authority of Webber, besides, was publicly exposed in his office, and it appeared positively that Webber had been directed by the Company not to make any insurance of the kind without forwarding the application to the General Agent. (Fol. 17.)

POINT SECOND.

The exception taken to the fourth instruction to the Jury should be sustained.

The question of good faith submitted to the Jury should not have been submitted to them. Certainly bad faith will not be presumed. There was not a particle of evidence of bad faith in the transaction. On the contrary, the evidence showed that the application was immediately and for a sufficient reason rejected. If the defendant in error could only recover in case the application was rejected in bad faith, the burden was on him to prove it, and without any proof tending to show that fact, the question should not have been submitted to the Jury. As it cannot be known upon what ground the verdict was found, this error should entitle the plaintiff in error to a new trial.

POINT THIRD.

The exceptions taken to the fifth instruction to the Jury should be sustained.

If the contract could only become operative upon the approval of the application by the General Agent, then the Company was under no obligation to give notice of its non-approval. The approval was the condition on which the contract became operative. Without that approval there was no contract. If there was any duty upon the part of the Company to inform the defendant in error that the risk was not approved, a breach of that duty might perhaps be the subject of a special action on the case. (*Perkins vs. The Washington Insurance Company*, 4 *Cow.*, 645, 664;) but *no breach of any such duty could create a contract which never existed*, and this action is founded on a contract, and without proof of one, cannot be sustained. Had the original risk been binding until disapproved by the Company, and a contract once shown in existence, as was the case in *Perkins vs. The Washington Insurance Company*, it perhaps might have been the duty of the Company to give notice of its disapproval. But the contract in this case, the plaintiff in error chose to make; and as there could be no contract until the approval of the application by the Company, then the event did not happen upon which the contract could only exist. Suppose no policy had been handed by the agent to the defendant in error, *suppose the rights of the parties depended on the application alone*, could there be any pretence that there was a contract actually made. It would be like any other application made to an underwriter for insurance, which the insurer did not assent to. Is a contract of insurance complete when an application is left at an Insurance Office, unless the underwriter finds the party applying and gives him notice that it will not make the contract? This case is precisely such an one. The policy handed the

defendant in error does not change its character, for it was expressly provided that the "*insurance*" which was "*wanted*," should not take effect until the risk was approved. This judgment cannot be sustained unless it shall be decided, in substance, that when an application for insurance is left at the office of an underwriter, it becomes a complete contract, although the underwriter expressly declines entering into it, unless the underwriter seeks the applicant and gives him notice that the application is not assented to.

POINT FOURTH.

The exception taken to the sixth instruction to the Jury should be sustained.

If it was a duty upon the part of the Company to notify the defendant in error of the non-approval of the risk, a breach of which duty would *create a contract*, then the question as to what was a reasonable time within which that notice should be given was a question of fact—certainly as much a question of fact as that submitted under the third instruction to the Jury. It should have been submitted to the Jury and not decided as a matter of law.

POINT FIFTH.

All of the instructions to the Jury excepted to constitute an error for which the judgment should be reversed. In substance nothing was left to the Jury, nor could they avoid rendering a verdict for the defendant in error. Certainly there must have been something for the Jury to pass upon, and as nothing was left to them in substance, the judgment must be reversed.

The portion of the charge excepted to in substance, was that the Company could only reject the risk in good faith, (and it may be said that the Company hardly "rejected" the application—it declined to enter into the contract,) and that if it did reject it in good faith, it was bound to give notice of the rejection in a reasonable time, and that as a matter of law a notice, if not given until after the loss of the vessel on the 25th of October, was not given in a reasonable time, and the defendant in error was entitled to recover. Certainly there must have been some question in the case for the Jury. Under the charge substantially, none was left to them, and they were virtually directed to find a verdict for the defendant in error.

GEORGE B. HIBBARD,
For Plaintiff in Error,
Buffalo, N. Y.

SUPREME COURT OF THE UNITED STATES.

No. 84.—DECEMBER TERM, 1867.

THE ÆTNA INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL H. WEBSTER.

ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

WILLIAM P. WELLS, Detroit, Mich., for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

THE ÆTNA INSURANCE CO.,
Plaintiff in Error,
vs.
SAMUEL H. WEBSTER,
Defendant in Error.

POINTS AND ARGUMENT FOR DEFENDANT IN ERROR.

The fundamental question in this case, and the one which will determine the correctness or incorrectness of the charges to which exceptions are taken, is, Whether there was a valid contract of insurance entered into on the 25th of September, 1860, between the Ætna Insurance Company and Webster, and, at that time, binding upon the company.

The bill of exceptions shows, (fols. 14, 15,) that on the 25th of September, 1860, William L. Webber was, and had been previously, the agent of the Ætna Insurance Company at East Saginaw, in the State of Michigan, appointed by a certain letter of authority, which was, on the said 25th of September, 1860, and had long been, publicly exposed in Webber's office. That on that day Webster applied to Webber, as agent of said corporation, for insurance upon the hull of the schooner "Ottoca," for the residue of the then season of navigation. That Webber thereupon caused to be filled up a policy of insurance upon said hull, and countersigned and delivered the same to Webster, which policy of insurance was duly signed by E. G. Ripley, then President, and Thomas K. Brace, then Secretary of said corporation. This policy was partly written and partly printed,

and a copy thereof is annexed to the bill of exceptions, marked Exhibit A, (fol. 24). At the same time Webster made and delivered a premium note for the amount of the premium mentioned in the policy, (fol. 15).

It also appears, (fol. 15,) that previous to said 25th of September, 1860, the agent, Webber, had in his possession the blank policy of insurance which was filled up and delivered to Webster, together with several other blank policies exactly similar to the policy so delivered, all which blank policies were duly signed by the said President and Secretary of said corporation. That said Webber had previously insured the "Ottoca," as agent for said corporation, in 1858, upon Webster's application, and had issued a policy of insurance thereon.

It also appears, (fols. 16, 17,) (having been given in evidence on the part of the Insurance Company,) that on said 25th day of September, 1860, *immediately after* the said policy was handed by said agent Webber to Webster, the latter, at the former's request, signed a paper called an application, a copy of which is annexed to the bill of exceptions, marked Exhibit B, (fol. 26). That prior to said 25th of September, 1860, (fol. 17), to wit, in the year 1859, Webber had been duly instructed to make no insurance on behalf of said company on the hulls of vessels until an application therefor, in the form of the application signed by Webster, had been first taken, duly signed by the party desiring the insurance, and by said Webber forwarded to one E. P. Dorr, a general agent of the company in that behalf, for his, said Dorr's, indorsement of approval or rejection. The blank forms for said applications had been furnished to Webber by the company, and one of them was used for the application so signed by Webster. This application was immediately forwarded by Webber to Dorr, for his approval or rejection, and was received by him on the 29th of September, and at once indorsed "not approved," and returned by mail to Webber with a letter, a copy of which appears in the bill of exceptions, (fol. 18). That prior to the issuing of the policy of 1858, above referred to, on the "Ottoca," Webster had made an application to Webber, which was submitted to one Bennett, then general

agent in that behalf, and approved by said Bennett, and Webber was authorized to issue the policy.

Upon these facts we submit:

POINT FIRST.

The instruction numbered III of the charge was correct, and should be sustained for the following reasons:

We insist that on the 25th of September, 1860, a valid contract of insurance on the "Ottoca" was entered into between the defendant in error, and the agent of the plaintiff in error, which contract was liable to be defeated by the rejection of the risk, in good faith and within a reasonable time, by the company.

Let us consider the acts of the parties, on the day in question, and the writings then executed, from which, as we claim, this contract resulted.

On that day Webster, the defendant in error, owner of the "Ottoca," applied for insurance on that vessel for the residue of the then season of navigation, to Webber, who was then, and had been for several years, acting as agent of the Ætna Insurance Company at East Saginaw, (fol. 15). This was apparently in the ordinary course of business, as Webster had previously procured insurance on the same vessel, from the same company, through the same agent, (fol. 16). What verbal negotiations passed between these parties does not appear; but the principal fact appears that Webber at once caused a policy of insurance to be filled up, according to the request of Webster, and countersigned and delivered it to him, (fol. 15). This policy was duly signed by the President and Secretary of the company and appears to be an ordinary marine policy of insurance. It is found in the record as Exhibit A, (fol. 24).

It insures the vessel from September 25th, 1860, to November 30th, 1860, for the sum of $1,733.

It acknowledges the receipt of a note for the amount of the premium, due Nov. 1st, 1860.

It contains the usual provisions of policies of that class.

The last clause which precedes the clause of execution, is as follows: "*This policy shall not be binding until countersigned by W. L. Webber, Esq., agent of the company at East Saginaw, Michigan.*" And following the signatures of the President and Secretary of the company are these words: "*Countersigned at East Saginaw this 25th day of September, 1860. William L. Webber, Agent.*"

Here, then, is a contract of insurance, upon its face apparently complete and valid, duly executed and delivered upon the day above mentioned.

But it is claimed on behalf of the plaintiff in error that here was no contract. Upon what grounds?

First.—Because Webber had no authority to make such a contract on behalf of the Insurance Company; and

Second.—Because of the paper called an application, signed by Webster immediately after the delivery of the policy.

1. *The Agency.*—The facts which bear upon the question of Webber's authority in the premises are, on behalf of the defendant in error: That he had for years acted as the agent of the Company at East Saginaw, (fol. 14); that his appointment was made by a written commission, which had been publicly exposed in his office for a long time previous to the day the policy was delivered, (fols. 14, 15,); that previous to said day he had in his possession the blank policy of insurance, which was filled up and delivered to Webster, together with several other blank policies, exactly similar to that, all which policies were duly signed by the President and Secretary of the Company, (fol. 16).

On the other hand, it appears on behalf of the company, (fol. 17,) that prior to the day in question, to wit, in the year 1859, Webber had been duly instructed to make no insurance on behalf of said company, on the hulls of vessels, until an application therefor, (like the one signed by Webster, and to be here-

after considered,) had been first taken, duly signed by the party desiring the insurance, and forwarded to the general agent of the company at Buffalo, for his approval or rejection.

There was no proof that these instructions were ever made known to Webster, or that he had any knowledge of them.

To the only specific instruction given in relation to the question of agency, viz., Instruction I, no exception was taken.

But it becomes necessary for the plaintiff in error, in order to sustain his exceptions, and to maintain his argument that there was no contract, to question the authority of the agent Webber.

We submit that the question of agency arising upon these facts is free from difficulty. It is a case calling for the application of the rule, that a principal who has permitted an agent to hold himself out as having authority to do a particular act, although the agent's authority has been limited by private instructions, is bound by the act of the agent within the general scope of his powers. The question is, what authority had the public and Webster a right to suppose the agent had, from the conduct of the company; how far did the company give the agent permission, and furnish him the means, to hold himself out as authorized to make complete contracts of insurance, notwithstanding his private instructions.

Webber had acted for several years as the agent of the company at East Saginaw, under a commission which is, of itself, fairly susceptible of the construction that he was something more than an agent to receive proposals for marine insurance, and that he was authorized to make contracts for such insurance, (see commission, fol. 14).

If his powers were to be determined from this commission alone, he was a *general* agent of the company.

But whatever construction may be given to the terms of the commission, and even if it had been much more limited in its terms than it actually was, other acts of the company clothed Webber with an authority which is more than ample to sustain the contract in question, under the rule we have mentioned.

The company delivered to him blank policies, duly signed by the officers of the company, and requiring only his counter-

signature, and the filling up according to the terms of any particular insurance required, to become complete contracts of insurance, valid on their face (fol. 16).

The terms of these blank policies implied that they were to become binding on the company when filled up and countersigned by the agent who had them in his possession (fol. 24).

Webber replied to Webster's verbal proposal of insurance by filling up, countersigning and delivering one of these policies (fol. 15).

From the possession of the policies, Webster was justified in believing that Webber had the requisite authority; from the completion and delivery of the policy, he was justified in believing that a binding contract had been made, and, in that belief, he paid the premium which was the consideration of the contract.

We submit that these facts constitute one of the strongest cases in which the legal principle to which we have adverted should be applied.

We ask the attention of the court to two authorities only upon this part of the case.

The case of *Perkins vs. the Washington Insurance Company*, 4 Cow., 645, is referred to in the brief of the counsel for the plaintiff in error. It is true that this was a proceeding in equity, and that the maxim of equity that what ought to have been done should be regarded as done, had some influence upon the mind of Woodworth, J., who delivered the leading opinion. But we submit that the case was really decided upon the question of agency. The decision of Chancellor Kent, who dismissed the bill in the court below, proceeds upon the ground that the agent had only a limited authority, and that the company had expressly refused to enlarge his powers, and had done nothing to hold out to the public or the plaintiff in the case that the agent had authority to bind them. This decree was reversed, and the opinion of Woodworth, J., as well as that of Colden, Senator, both expressly put the reversal on the principle which we invoke in the case at bar.

The case of *Lightbody vs. the Northwestern Insurance Company*, 23 Wend., 18, is one strictly parallel to the case at bar. In that case, as in ours, the company had placed blank policies in the possession of the agent, and this fact is held by the learned Judge BRONSON, who delivered the opinion, to be a decisive act on the part of the company in the determination of the question of the authority of the agent.

2. *The Application.*—The legal effect of this paper is, we submit, stated with entire precision in Instruction III, which is the first to which exception is taken.

"It authorized the defendant, in good faith, but not arbitrarily, to reject the application and annul the policy issued to the plaintiff."

The theory of this instruction is, that the transaction between Webber and Webster consummated a contract of insurance between them which was binding upon the company. But as the application had been signed by Webster, simultaneously with the delivery of the policy, it was to be considered in connection with the policy, and it became necessary, therefore, to instruct the jury as to its legal effect.

This paper is not to receive the same construction as a naked proposal for insurance, signed by Webster and sent to the general agent for approval or rejection, would have received.

It is to be construed as one part of a transaction of which the delivery of the policy and the payment of the premium were the other parts.

And it should be remarked that the form of the paper is not such as should have been adopted if the company intended that the agent should not issue policies until the application had been approved by the general agent. The words, "The insurance on this application is to take effect when approved," etc., seem to contemplate just such a course of business as was actually pursued by Webber in this case. If the blank was meant to be used only as a proposal, apt words would have been, "Policy to issue when this application is approved," etc. This

consideration has a bearing upon the question of Webber's authority. It is a notification to Webster that the agent was permitted by the company to do what he did.

But whether this paper is so construed or not; whether it was the intention of the company that a policy should be delivered upon the signing of this application; or whether, by other acts, they had held out Webber as authorized to deliver binding polices, the result is the same.

The company is equally precluded, in either case, from insisting that the application alone is to be considered, as is really maintained in the argument for the plaintiff in error, or that the transaction was a mere proposal for insurance.

The utmost effect that can be given to the application is, that under it the company had a right to annul the policy, for sufficient reasons, but not arbitrarily, or at pleasure. It could exercise this right in cases of fraud or mistake, and there might be others in which the reasons would be equivalent to fraud or mistake.

This is the only construction of such a paper, given under such circumstances, which is consistent with the safety of the public, in dealings of this nature.

And this construction has been adjudged to be correct.

Palm vs. The Medina Insurance Company, 20 Ohio, 537. In this case nothing had been done except the signing of the application, the delivery of the premium note to the agent, and the transmission of the application to the office of the company. The agent had not pretended to bind the company. The property insured was destroyed the day before the application reached the office of the company. The company was held liable, and upon the ground that a contract of insurance had been made.

This, obviously, is not as strong a case as that of the defendant in error here.

We submit, therefore, that the result of the preceding argument is to establish the correctness of Instruction III.

POINT SECOND.

We shall consider Instructions IV and V together.

If the only legal effect of the application was, as we have maintained, and as set forth in Instruction III, to give the Company a right to annul the contract for sufficient reasons, then the question whether the rejection was arbitrary, or upon reasons sufficient within Instruction III, was for the jury. Instruction IV submitted this question to them. Evidence as to the manner and reasons of the rejection was given (fol. 18). The reason of the rejection of the application was the unwillingness of the company to take marine risks at a period so late in the season. It was certainly for the jury to determine whether this rejection was arbitrary or "in good faith," which is an equivalent expression for "sufficient reasons."

It is said that the reason given by the company was sufficient. It is not necessary to discuss this point because of the facts which gave occasion for Instruction V.

The bill of exceptions shows, (fol. 21,) that the company did not, nor did any one in their behalf, give notice to Webster of the rejection of the application, until the 27th day of October, 1860, when Webster, having called on the agent to give him notice of the loss, was informed that the application had been rejected.

The vessel was lost on the 25th of October, (fol. 16).

By Instruction V the jury were told that if the company rejected the application in good faith, it was bound thereupon, under the circumstances of the case, to give notice of that rejection to Webster within a reasonable time.

Certainly, if the company had the right to annul the contract, a mere intention to do so, uncommunicated to Webster, although communicated to the local agent, could not operate to annul the contract.

The notice to Webster, within a reasonable time, is involved in the very idea of the right to annul.

A failure to notify Webster was a non-exercise of this right.

And so the company regarded it. The letter of the general agent to Webber, dated Sept. 29th, (fol. 18,) instructs him, in effect, to give this notice. This, however, was not done.

POINT THIRD.

By instruction VI the jury were charged that if no notice was given to Webster, and no knowledge of the rejection of the risk came to him until after the loss of the vessel on the 25th of October, he was not notified within a reasonable time, and he was, in that event, entitled to recover.

Certainly no exception to this instruction can be sustained.

What is a reasonable time is a question of law.

2 Pars. on Cont. (3d ed.), 47, 173.

And the court may instruct the jury that an act has, or has not, been performed within a reasonable time.

Stodden v. Harvey, Cro. Jac., 204.
Doe v. Smith, 2 T. R., 436.
Hunt v. Royal Exch. Assurance, 5 M. & S., 47.
Ellis v. Paige, 1 Pick., 43.
Porter v. Blood, 5 Pick., 54.
Attwood v. Clarke, 2 Greenl., 249.

All the exceptions taken should be overruled, and the judgment below affirmed.

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For Defendant in Error.